Supreme Court, U.S.
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No. 93-119

In The

Supreme Court of the United States

October Term, 1993

THE CADLE COMPANY II, INC.,

Petitioner,

v.

CHARLES R. CHASTEEN, BILLY M. CARTER, JIMMY J. HOLMES AND LENDELL D. ROBERTS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the determination by a District Court in a diversity action of what constitutes a "reasonable" hourly rate for an attorney's fee allowance under a state fee-shifting statute, in addressing an undecided issue of state law, should be guided by how the District Court believes the state's courts would decide the matter rather than by how federal courts would rule on similarly worded federal statutes?

STATEMENT OF THE CASE

The facts of the case are stated in the decisions of the District Court (Petitioner's Appendix B, at 2-4 and 7-8) and the Court of Appeals (Petitioner's Appendix A, at 2-4).

SUMMARY OF THE ARGUMENTS

In this diversity case, the District Court and Court of Appeals applied what they found to be the law of Oklahoma in respect to a state fee-shifting statute, in an instance where there was no state decisional law directly on point. The lower federal courts properly approached the issue as if they were sitting as a state court.

Petitioner has not demonstrated a conflict with the decisions of this Court, suggested a conflict among the circuits or raised an issue under the Constitution or Federal law.

ARGUMENT

I.

THE LOWER FEDERAL COURTS CORRECTLY APPLIED THE ERIE DOCTRINE

The resolution of this Petition begins and ends with an Oklahoma statute providing for allowance of "a reasonable attorney fee" to the prevailing party in certain actions. In an action founded on diversity, Respondents prevailed in federal district court and on appeal. During the action, Respondents' attorney retroactively reduced

his hourly rate for services from $125.00 per hour to $62.50 due to hardship the litigation imposed on Respondents. The District Court determined Oklahoma courts would apply a market based rate and fixed $125.00 as a reasonable hourly rate in assessing attorneys fees.

Although Petitioner does not dispute that a reasonable hourly rate under most circumstances was that selected by the District Court, it argues the District Court and Court of Appeals should have applied Okla. Stat. Ann. tit. 12, § 936 (West 1988) by reliance on a decision of the United States Claims Court in *Florida Rock Industries, Inc. v. United States,* 9 Cl.Ct. 285 (1985), applying the reimbursement provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 43 U.S.C. § 4645(c) (1976). See, Petition, at 12. Likewise, Petitioner asserts the lower courts should have followed Judge Starr's dissenting opinion in *Save Our Cumberland Mountains, Inc. v. Hodel,* 273 U.S.App.D.C. 78, 857 F.2d 1516, 1528 (D.C. Cir. 1988) (en banc) addressing reasonable attorney fees under, among other federal statutes, § 530(d) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d).

Decisions from *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) to *Commissioner v. Estate of Bosch,* 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) direct otherwise. Naturally, while authority on similarly worded federal fee-shifting statutes may be persuasive in applying a state statute to a non-constitutional issue unaddressed by the state's highest court, a federal court is to choose the rule it believes the state is likely to adopt. In such circumstances, federal courts sit, in effect, as state

courts. *Estate of Bosch,* 387 U.S. at 465, 87 S.Ct. at 1782-1783.

Petitioner does not even contend Oklahoma courts might agree that a discounted 'hardship' hourly rate sets the upper limit of a "reasonable" rate under Okla. Stat. Ann. tit. 12, § 936 (West 1988). Indeed, Petitioner cites no Oklahoma case authority.

Petitioner's exclusive reliance on federal fee-shifting authorities is understandable in light of the approach to setting attorney fees historically taken by Oklahoma's highest Court.

To set a reasonable attorney fee, Oklahoma courts determine a multiplier of a reasonable number of hours times a reasonable rate. Although Oklahoma courts initially look to the hourly rate for comparable representation where compensation is guaranteed, they then adjust the hourly rate where compensation is contingent by assessing the likelihood of success at the outset of the representation. After determining this hourly rate base, the courts then look to the 12 "Johnson" factors as guidelines to decide if the hourly calculation should be adjusted upward. *State ex rel. Burk v. City of Oklahoma City,* 598 P.2d 659, 661 (Okla.1979); *Oliver's Sports Center, Inc. v. National Standard Ins.,* 615 P.2d 291, 294-295 (Okla. 1980).

Comparison of these Oklahoma decisions with this Court's ruling in *City of Burlington v. Dague,* ___ U.S.___, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) is sufficient to demonstrate that federal case law on what is "reasonable", while persuasive, is not a sure road map to how Oklahoma courts will decide the issue.

Federal courts, in deciding issues of state law in diversity cases, keep in mind that their function is not to choose the rule they would adopt for themselves, but to adopt the rule they believe the state's highest court will adopt when faced with the issue. *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940).

Petitioner fails to demonstrate why the *Erie* Doctrine should be abandoned in favor of the federalization of state attorney fee statutes.

II.

PETITIONER HAS FAILED TO DEMONSTRATE WHY A WRIT SHOULD ISSUE

It need only be noted in passing the Petitioner claims no conflict among the circuits, raises no Constitutional issues and does not contend its rights under federal statute have been impeded.

Moreover, Petitioner has not demonstrated any conflict with the decisions of this Court. Petitioner ignores the Court of Appeals analogy to the holding of *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct 939, 103 L.Ed.2d 67 (1989) with the result in this case. See, Petitioner's Appendix A, at 7-8. In *Missouri v. Jenkins*, 491 U.S. 274, 283, 109 S.Ct. 2463, 2469, 105 L.Ed.2d 229, 240 (1989) the Court stressed attorney fee awards are to be based on market rates for services rendered under the Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. § 1988). The ruling below follows this path.

Finally, contrary to Petitioner's claim, the District Court did not award any "bonus"; indeed none was requested. See, Petitioner's Appendix B, at 15. Rather, the District Court multiplied a reasonable number of hours times a reasonable rate to arrive at an award. By definition, there was no "windfall". *Blanchard, supra,* 489 U.S. at 96, 109 S.Ct. at 946.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

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